IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 965 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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USMANGANI ALIAS BHURO GULAM RASUL MANSURI

Versus

STATE OF GUJARAT

Appearance:

MR CK PANDYA for MR RJ GOSWAMI for Petitioner No. 1

MR HL JANI, Ld. APP for Respondent

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 13/07/2001

ORAL JUDGEMENT

1. Heard Mr.C.K.Pandya, learned advocate for the petitioner and Mr.H.L.Jani, learned advocate for the respondent - State.

2. In the present petition, the petitioner has

challenged the externment order dated 8/11/2000 passed in Externment Case No.7 of 2000 by the Sub-Divisional Magistrate, Dholka, Dist.Ahmedabad.

3. Mr.C.K.Pandya, learned advocate for the petitioner has challenged the order of externment on the ground that the show cause notice is too vague and no specific allegations have been made by the concerned Authority against the present petitioner. The learned advocate for the petitioner has also pointed out that Chapter Case Nos.22 and 255 of 1999, which relate to the Criminal Procedure Code and does not relate to the Indian Penal Code, has been taken into account, while issuing the show cause notice to the petitioner which amounts to non-application of mind on the part of the concerned Authority. The learned advocate for the petitioner has also submitted that the concerned Authority has proposed to extern the petitioner from Ahmedabad (Rural), Ahmedabad City, Gandhinagar, Mehsana, Kheda and Surendranagar for a period of two years. But there was no indication or reason given by the concerned Authority in support of his proposed decision because the activities of the petitioner confined only to the Dholka and not in respect to the other adjoining Districts. He has also submitted that similar view has been taken by this Court in the case of MUSTUFAMIYA PIRSAHEDMIYA SAIYED v. STATE OF GUJARAT & ANOTHERS, reported in 1999 (1) G.L.H. 913. The relevant head-note - (C) is quoted as under :-

"(C) Bombay Police Act, 1951 - S.59 - Externee is ordered to be externed from Ahmedabad City, Ahmedabad Rural, Gandhinagar, Kheda and Vadodara - No reason given - Whereas activities confined to Ahmedabad Rural - Order quashed.

Another non-application of mind in the show cause notice is exposed from the concluding portion where the externing Authority has mentioned that the petitioner should be externed from districts of Ahmedabad City, Ahmedabad Rural, Gandhinagar, Kheda and Vadodara. No reason has been given in the show cause notice why externment from these districts was proposed when the activities of the petitioner were confined only to the district of Ahmedabad Rural."

4. The learned advocate for the petitioner has also submitted that there was delay in passing the externment order, looking to the fact that the offences, which have been registered against the present petitioner, relate to

the Year 1999 and show cause notice was issued on 7/9/2000 and the order of externment has been passed on 8/11/2000. Therefore, there is a delay in passing the externment order against the present petitioner. For that he has relied upon the decision of this Court in the case of BALVANTSINGH @ NANIO KALYANSINGH RAJPUT v. DEPUTY COMMISSIONER OF POLICE, VADODARA & ANR., reported in 1999 (1) G.L.H. 207. The relevant head note - (A) of the said decision is quoted as under :-

"(A) Bombay Police Act, 1951 - S.56(b) - Delay in passing externment order - Last undisclosed witness was examined on 21-2-1997 and the externment order was passed on 1-10-1997 - Delay of about nine months - Not explained by Authority - Externment order quashed."

The third contention which has been raised by him is that the show cause notice has been issued under Section 56(a) and the final order which has been passed against the present petitioner was under Section 56(a) and (b) and, therefore, it amounts to non-application of mind, while passing the externment order by the concerned Authority.

5. Mr.H.L.Jani, learned APP appearing on behalf of the respondent - State has submitted that looking to the material on record and offences registered against the petitioner, the order of externment has been rightly passed by the concerned Authority. He has also submitted that in show cause notice, all the details have been given and after considering the reply submitted by the petitioner, the concerned Authority, after giving the detailed reasons, passed a proper order, which is not required to be interfered by this Court.

6. I have considered the submissions of both the learned advocates. The respondent has not filed any reply to the petition. Looking to the order of externment of externee from certain areas, there is no indication that at any time the petitioner has committed an offence, which was either registered or unregistered and there was no such reason given by the concerned Authority in support of his proposed conclusion. The same view was taken by this Court in above referred case of MUSTUFAMIYA PIRSAHEDMIYA SAIYED v. STATE OF GUJARAT & ANR., reported in 1999 (1) G.L.H. 913 and the relevant head note - (C) is as under :-

"(C) Bombay Police Act, 1951 - S.59 - Externee

is ordered to be externed from Ahmedabad City, Ahmedabad Rural, Gandhinagar, Kheda and Vadodara - No reason given - Whereas activities confined to Ahmedabad Rural - Order quashed.

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7. In respect of the contention about the delay, while passing the externment order, the relevant decision, in the case of BALVANTSINGH @ NANIO KALYANSINGH RAJPUT v. DEPUTY COMMISSIONER OF POLICE, VADODARA & ANR, reported in 1999 G.L.H. 207 has been cited and the relevant head note (A) is quoted as under :-

"(A) Bombay Police Act, 1951 - S.56(b) - Delay in passing externment order - Last undisclosed witness was examined on 21-2-1997 and the externment order was passed on 1-10-1997 - Delay of about nine months - Not explained by Authority - Exetrnment order quashed.

The period and area of alleged activities are not mentioned in show cause notice which ultimately, rendered the proceedings invalid. The relevant para-(4) of the aforesaid decision is quoted as under :-

"4. First contention has been that there was delay in passing the externment order. The externment order was passed on 1-10-1997. The show-cause notice was issued to the petitioner on 7-5-1997. One case under Sections 323, 325, 114, 506 Indian Penal Code and Section 135 of the Bombay Police Act was registered in the year 1994. It was urged that the cases against the petitioner under the Prohibition Act were not taken into consideration by the Externing Authority. The Externing Authority considered the statement of two witnesses. This contention seems to be incorrect. The order of Externing Authority considered the statement of three witnesses recorded on 9-12-1996, 23-12-1996 and 21-2-1997 were taken into consideration. These

witnesses on account of the fear of the petitioner refused to disclose their identity and requested for keeping their names and addresses secret. Consequently it is to be seen whether the externment order passed on 1-10-1997 suffers from the fatal defect of delay as computed from 21-2-1997 when the third witness was examined. Of course, from registration of first case under the Indian Penal Code in the year 1994 there is considerable delay in passing the impugned order on 1-10-1997. computed from 21-2-1997 when the last undisclosed witness was examined there seems to be further delay of about nine months. in support of his contention the counsel for the petitioner has referred to the case of Khemiben w/o Ishwarji Harchandji v. Deputy Police Commissioner, reported in 1997 (2) G.L.H. 473. In this case the externment order was passed after about more then one year. This unexplained delay was considered, in the aforesaid case to be fatal and the externment order was quashed. In the case before me also there is no explanation of this delay of about nine months. No Counter-Affidavit has been filed from the side of the respondent explaining the reasons for delay in passing the impugned order of detention. Thus, unexplained delay of nine months is certainly fatal and impugned order is illegal and invalid. Learned A.G.P. on the other hand has relied upon a Division Bench pronouncement of this Court in Babubhai M. Shaikh v. State of Gujarat, reported in 1989 (1) G.L.R. 574. The ratio of this is that the Externing Authority must be subjectively satisfied that there exists grounds for passing externment order and there must also be material to show that witnesses were not prepared to depose against the externee. If these two conditions are satisfied merely because there is some delay or because the externee is in jail could not vitiate the order of externment. The contention raised by the learned Counsel for the respondent in the case before me was directly not under consideration before the Division Bench in Babubhai's case (supra). From para : 9 of the said judgment it is clear that according to Division Bench there was delay in passing the externment order, but this delay was considered to be insignificant. The delay was on another ground not on the grounds argued in this writ petition. The grounds of challenge in Babubhai's case were all together different. In that case

externment order was passed on 4-8-1988. The externee submitted his written submissions and oral arguments on 6-6-1988. Thereafter detention order was passed on 4-8-1988. This was considered to be insignificant delay. Hence, the detention order was held to be valid. Here the delay under consideration was the delay which took place in the conduct of proceedings whereas the point raised before me has been delay in passing the impugned order after disclosure of last unregistered case against the petitioner. Consequently this case does not help the learned A.G.P. The delay has not been satisfactorily explained by the respondent which has rendered the impugned orders invalid."

8. Similarly, the ground, which is not mentioned in the notice under Section 59 of the Act, cannot be considered, while passing the order of externment. In the present case also certain facts, which have not been disclosed in the show cause notice, have been taken into account by the concerned Authority while passing the externment order against the present petitioner. However, the detailed discussion and reasons have been given by the concerned Authority, while passing the final order of externment. The view taken by this Court in the case of SURESH SOMA @ DULO HARIJAN v. STATE OF GUJARAT & ORS., reported in 2000 (1) G.L. H. 547 is relevant and the relevant Para-(5) is quoted as under :-

"5. Having regard to the rival side contentions and considering the scheme of the Act, it transpires that before passing any order of externment under Section 56, the externing Authority is required to issue a notice to the proposed externee under Section 59 of the Bombay Police Act. The externing Authority has issued a notice as required under Section 59. This provisions of law is made with a view to enable the proposed externee to meet with the allegations against him, which are considered requisite/sufficient by the externing Authority for passing an order of externment. The notice, therefore, has to be specific and in detail. It is settled proposition of law that a ground which is not stated in the notice issued under Section 59, cannot be considered while passing the order by the Authority and if it is so done, it would be non-compliance of Section 59 and would vitiate the externment order. This is with a view that the person to be externed must have an

opportunity, in true sense and spirit, to meet with and explain why order should not be passed against him on the grounds which are brought to his notice in the notice. If any of the grounds which is considered by the externing Authority while passing the order is not put to the proposed externee in the notice, it can be said that his right under Section 59 is infringed. In this view of the matter, the petition deserves to be allowed only on the ground that the externing Authority has taken into consideration offences registered with Junagadh "A" Division Police Station vide C.R.No.II 143/97, which were not put to the petitioner in the notice."

9. However, it is important to note that the show cause notice has been issued under Section 56(a) of the Act, but the order of externment has been passed under Section 56(a) and (b) of the Act. Therefore, it is also clear non-application of mind on the part of the concerned Authority.

10. In view of the above reasons and considering the observations of this Court in respect to each contentions, according to my opinion, the order of externment is required to be quashed and set aside.

11. In the result, the present petition is allowed. The impugned order of externment dated 8/11/2000 is hereby quashed and set aside. Rule is made absolute. Direct service is permitted.

(H.K.RATHOD,J.)

(vrpanchal)**